A

TEH KHENG PING
(SUING AS THE LAWFUL SON OF LIM AH SIM, DECEASED)

v.

B

PRUDENTIAL ASSURANCE MALAYSIA BHD

HIGH COURT MALAYA, ALOR SETAR
SEE MEE CHUN JC
[CIVIL SUIT NO: 22NCvC-152-6-2012]
C 28 JANUARY 2013

INSURANCE: *Duty of disclosure - Material facts - Withholding of - Deceased's failure to disclose that she was having breast tumour - Whether deceased knew she was having breast tumour at time of taking* D *policy - Whether answers given by deceased in medical questionnaire was accurate and correct - Whether defendant had to prove fraudulent misrepresentation - Whether defendant liable to pay benefits under policy - Insurance Act 1996, ss. 147(4) & 150(1)*

E The plaintiff filed this action against the defendant for a claim of RM400,000 being the sum payable under a Prulink one plan policy ('the policy') taken out by Lim Ah Sim ('deceased'). The deceased was the plaintiff's mother and the benefits under the policy had been absolutely assigned to the plaintiff. The deceased F was then 64 years old when she applied for the policy. Due to her age and the amount applied for, the deceased was required to go through a medical examination which was duly performed on 21 February 2011. The proposal was then accepted by the defendant on 1 March 2011. However, the deceased passed away G on 23 June 2011. Denying its liability to pay the plaintiff, the defendant argued that there was non-disclosure of material information which related to the deceased's breast tumour. It was further stated, *inter alia*, that the deceased had not given truthful answers on her medical condition in the proposal form nor in the H statement to the medical examiner. It was the defendant's case that as at 17 September 2010, the deceased knew that she had breast tumour and on that day, she had gone to see one Dr Partheeban ('DW3'). Having received the deceased's blood test results, DW3 advised the deceased's family members that the I results showed a malignant breast tumour and for the deceased to see a specialist. During trial, the defendant's insurance agent

('DW2') testified that the deceased approached him in 2011 to take the policy. Having explained the terms and conditions of the policy, DW2 then brought the deceased to one Dr Koshy on 21 February 2011. According to DW2, the deceased did not inform Dr Koshy about her breast tumour. The medical questionnaire ('C16-18') prepared by Dr Koshy in relation to the deceased was submitted in court as "documents which were agreed subject to cross examination". Among the issues that arose for consideration were, (i) whether the deceased had not disclosed material information thereby rendering the defendant not liable to pay the benefits under the policy; and (ii) whether C16-18 which was prepared by Dr Koshy could be considered since he was not called as a witness.

Held (dismissing plaintiff's claim with costs):

(1) The court preferred the evidence of DW3 because the fact of his diagnosis of breast tumour was supported by the blood test results as reflected in the medical questionnaire which showed a raised level of "CA" indicating the presence of tumour cells. The fact that DW3 did not tell the deceased personally about the breast tumour because he was unsure did not detract from what DW3 told the family members about the need for a biopsy. There was also evidence from DW3 that the deceased must have known that something was wrong with her. DW3's advice for them to see a specialist was a good medical practise. (paras 5 & 10)

(2) As at 17 September 2010, the deceased knew that she had breast tumour. Evidence showed that DW2 had explained to the deceased about her obligation to disclose her medical condition (s. 150(1) of the Insurance Act 1996). Further, the non-disclosure of breast tumour was material as this involved a life policy. If this information and that of the advice to see a specialist had been disclosed at the proposal stage, the defendant would have declined the policy. (paras 5, 12 & 13)

(3) Relying on *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor*, the documents which were agreed subject to cross-examination were made agreed documents without any qualification by the plaintiff's counsel. Hence, C16-18 was an

agreed document in terms of its authenticity and contents. It was not necessary for the defendant to call Dr Koshy as a witness because what was being offered through C16-18 was the clarification on the clinical examination done. The sum total of the medical questionnaire was that no breast examination was done and the nurse having prepared the deceased for ECG was not qualified to have detected the tumour. Even if the contents in C16-18 were held to be disputed, the facts of the nurse preparing the deceased for the ECG and her competence to detect the tumour remained intact. (paras 15, 16 & 17)

(4) In the proposal form of the declaration (B84), it was stated that the information given in the proposal form and any information given to the medical examiner was true, full and complete and no important information had been withheld. It followed that any untrue and incomplete statement would be a ground for the defendant to avoid the contract of assurance. On the facts, the defendant had proved that the answers given by the deceased in her statement to Dr Koshy were inaccurate and incorrect. (paras 18 & 19)

(5) The defendant had to prove material non-disclosure and not fraudulent misrepresentation. Section 147(4) of the Insurance Act 1996 requires fraudulent misrepresentation if the policy sought to be invalidated is after the expiry of two years from the date on which it was effected. However, the policy sought to be invalidated herein was within the two years period from when it was effected. (para 21)

Case(s) referred to:

Aetna Universal Insurance Sdn Bhd v. Fanny Foo May Wan [2001] 1 CLJ 476 HC ***(refd)***

AlliedBank (Malaysia) Bhd v. Yau Jiok Hua [1998] 2 CLJ 33 HC ***(foll)***

Chong Khee Sang v. Pang Ah Chee [1983] 1 LNS 57 HC ***(refd)***

Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1994] 4 CLJ 509 SC ***(foll)***

Legislation referred to:

Insurance Act 1996, ss. 147(4), 150(1)

For the plaintiff - SP Raman; M/s S Raman & Co

For the defendant - K Navinderan; M/s Shearn Delamore & Co

Reported by Kumitha Abd Majid

JUDGMENT

See Mee Chun JC:

[1] This is a claim by the plaintiff against the defendant for RM400,000 being the sum payable under a Prulink One Plan policy taken out by Lim Ah Sim (the deceased). By proposal form dated 9 February 2011, a sum of RM200,000 was applied for. The deceased was then 64 years old. Due to her age and amount applied for, the deceased was required to go through a medical examination which was duly done on 21 February 2011. The proposal was accepted by the defendant on 1 March 2011. The defendant's agent (DW2, Ong Sze Ean) then suggested to the deceased to top up as she would be unable to do so at 66 years. This resulted in a supplementary proposal form, dated 11 April 2011, to top up by another RM200,000. The supplementary proposal was also accepted by the defendant. The policy is in B 1-119. The deceased passed away on 23 June 2011 and the cause of death given in the death certificate (B 122) is "old age". The deceased and the plaintiff are mother and son and the benefits of the policy had been absolutely assigned to the plaintiff.

[2] The defendant denies liability to pay stating non-disclosure of material information relating to a breast tumour by the deceased. The defendant relies on the proposal form which contains the note requiring the deceased to fully and faithfully disclose all the facts which she knows or ought to know (B 73) and that the signed declaration in B 90 the information given in the proposal is true and nothing material has been withheld. It was further stated that the deceased had not given truthful answers on her medical condition in the proposal form as in B 79-82 nor in the statement to the medical examiner at B 129-133.

Primary Issue

[3] The primary issue is whether the deceased had not disclosed material information thereby rendering the defendant not liable to pay out the policy benefit.

Whether Material Information Had Not Been Disclosed

[4] The evidence of the plaintiff and PW2 (the daughter with whom the deceased was staying with) is that their mother was in good health at the time of purchase of the policy. Whenever she was not well PW2 would be the one bringing her to the clinic. It

A is further their evidence that after the purchase of the policy the deceased was brought to Pantai Hospital Sungai Petani twice. The first was on 22 March 2011 when the deceased was feeling giddy and vomited but the doctor said there was nothing wrong. The second occasion was on 6 April 2011 when the deceased fell in
B the toilet of PW2's shop, hit something resulting in bleeding. She was admitted to the hospital and they were then told that their mother had a tumour. Prior to this they were not aware.

[5] The defendant's case is that as at 17 September 2010, the
C deceased knew of her tumour. On that day she had had gone to see Dr Partheeban (DW3). It is DW3's evidence that the deceased was brought in by the immediate family members who were the husband, PW2, and the plaintiff for blood tests. He did a medical examination and the deceased complained of swelling.
D There was some herbal medication on her left breast. DW3 advised the plaintiff and PW2 in the presence of the deceased to do a biopsy and see a specialist. The blood test result as in D 1-3 was received on 21 September 2011. The husband and PW2 came to collect it. DW3 advised them that the results
E showed a malignant breast tumour and for the deceased to see a specialist. The deceased came again on 9 November 2011 for a dressing. In cross-examination to a question whether the deceased was aware of her breast condition he replied "she must be aware of something". No tissue or histopathology test was done. As to
F whether a biopsy and tissue test would better confirm breast tumour he replied "to a certain extent". He did not give any treatment for the breast tumour. He was sure as to who had accompanied the deceased to his clinic. The plaintiff is also his patient. He didn't give any referral letter. To a question that he
G didn't personally tell the deceased that she had breast tumour, he replied "Yes because not sure". In re-examination he said he could not be sure if there was growth except if there had been a histopathology and if there was any abnormality on the breast, it can be seen visually. When he examined her he saw the breast
H mass and told the family members. No tissue test was done as he didn't have the facility. His advice for them to see a specialist is good medical practice.

I

[6] DW3 prepared the medical questionnaire in C 12-15. In para. 2 is stated the patient ie, the deceased complaint of left breast swelling and the diagnosis of left breast mass and the advice to see a specialist for biopsy and diagnosis. The results of blood investigation done on 17 September 2010 was recorded in para. 3.

[7] The plaintiff denied that he had accompanied the deceased to see DW3. PW2 said she had brought the deceased to DW3 on 17 September 2010 as her mother wanted a medical check-up for 36 diseases. No one else went along. DW3 suggested a blood test and didn't examine the deceased. On 9 November 2011 they went back a second time and DW3 showed them the results. DW3 told them everything was all right, didn't say that the deceased had cancer, tumour or swelling. In cross-examination PW2 said she didn't know why the deceased wanted the check-up and that she was not told it was for insurance. Before this she had not brought the deceased for any 36 diseases check. She knew of DW3 as she brings her children there. She denied she brought the deceased to DW3 when she complained of swelling or that DW3 had told them of the breast tumour.

[8] DW2 testified he has been an insurance agent with the defendant for nine years. The deceased is a customer and had applied for a policy in 2003. In 2011 the deceased had approached him to take a policy. He met her at the shop and explained the benefits and terms and conditions. He did a quotation. She was not keen then as she wanted to get the budget. Six days later there was a second meeting where he explained again the terms and conditions. This time she agreed to buy and he then filled up the proposal form in front of the deceased. He explained that "whether healthy or not she must declare to me". On the health particulars in B 73-85 he asked the questions in Hokkien, the deceased answered and he filled in.

[9] After DW2 submitted the proposal form the defendant then asked for a medical examination and DW2 brought the deceased to Dr Koshy of Klinik Marten on 21 February 2011. Dr Koshy asked on her medical condition and medical history. A clinical examination and an ECG was done. The medical examination form as in B 129-133 was filled up and given to DW2. DW2 did not know that the deceased had seen DW3 on 17 September 2010. The deceased did not inform him of her breast tumour. In cross-examination DW2 was specifically asked how he explained B 78 (2), 80 (4.3 g), 81 (4.6 c) to the deceased to which he said it

A was explained in Hokkien and the deceased understood. He did not explain the declaration in B 85. He was satisfied that the deceased had given truthful answers. As to whether he noticed her health condition when he was explaining to her he said she looked well and healthy. On B 129 Dr Koshy filled up when he
B (DW2) was in the room. The doctor asked the deceased the questions. Question 4 was asked in Malay and Hokkien. The deceased could speak well in Malay as she runs a sundry shop. The deceased signed at B 131 in front of Dr Koshy. DW2 knew that the deceased was telling the truth to Dr Koshy. Dr Koshy
C personally examined her. The defendant refused to pay as the deceased hadn't told the truth. His opinion was that the deceased told the truth as she passed the medical examination. In re-examination as to the deceased health he said that he wouldn't know if the deceased was having breast pain. On him being
D satisfied with the deceased's answers he wouldn't know if she chooses not to disclose the information on her medical condition.

[10] From the evidence it is clear that the deceased had gone to see DW3 at his clinic on 17 September 2010. What is disputed
E is what had transpired at the clinic. As between the evidence of the plaintiff, PW2 and that of DW3, I prefer that of DW3. This is because the fact of his diagnosis of breast tumour is supported by the blood test results in D 1-3 as reflected in his medical questionnaire in C 12-15 (para. 3) which showed a raised level of
F "CA" indicating the presence of tumour cells. DW3 had advised the family members in the presence of the deceased for a biopsy to be done and for her to see a specialist. That he did not give a referral letter is not material to the fact of his diagnosis and as further explained by his advice to see a specialist is a good medical
G practice. On him not telling the deceased personally because he was unsure, does not detract from what he told the family members about the need for a biopsy. There is also his evidence that the deceased must know that something is wrong with her.

H **[11]** Thus the deceased knew that as at 17 September 2010, the day of her visit to DW3, she had a breast tumour. Accordingly the deceased had failed to give truthful answers by answering "No" to the questions in the proposal form as below:

I B 78 Question 1. Have you ever had or been told you had or been treated for … cancer or tumour … ?

B 78 Question 2. Have you ever had or been advised to undergo any diagnostic tests, investigations or operations, or referred to any specialists of hospital?

B 80 Question 4.3. Have you ever had or been told you had or been investigated or received or currently receiving treatment or advice for: A

(g) Cancer … tumour, growth …

B 81 Question 4.6c. Have you ever had any disease or disorder of the breast, … including breast lump … B

The deceased had further failed to answer questions fully and truthfully in the statement to the medical examiner, Dr. Koshy, as below:

C

B 129 In the column on personal doctor she had answered she had no particular doctor and none for "date of last consultation" and none for "reasons for consultation".

B 129 Question 2. Have you ever had or been told you had or been treated for: D

(h) Cancer, tumour, cyst or any growth?

B 130 Question 4. In the past 5 years have you had any:

(a) diagnostic tests such as …blood or other urine tests? E

(b) … medical advice … or physical check up not mentioned above?

[12] The evidence also shows DW2 had explained to the deceased her obligation to disclose her medical condition. Section 150(1) of the Insurance Act 1996 states as follows: F

Duty of disclosure

150(1) Before a contract of insurance is entered into, a proposer shall disclose to the licensed insurer a matter that- G

(a) he knows to be relevant to the decision of the licensed insurer whether to accept the risk or not and the rates and terms to be applied; or

(b) a reasonable person in the circumstances could be expected to know to be relevant. H

[13] DW1 (the defendant's senior claims manager) had explained that the non-disclosure of breast tumour was material as this involved a life policy. If this information and that of the advice to see a specialist had been disclosed at the proposal stage, they would have declined the policy. I

A **Medical Examination On 21 February 2011**

[14] If the deceased had a breast tumour from as early as 17 September 2010 and she knew it, the question arises as to how she could have passed the medical examination carried out
B by Dr Koshy on 21 February 2011. In this regard the issue is whether the medical questionnaire prepared by Dr Koshy in C 16-18 who was not called as a witness can be considered. This document was placed in "Ikatan Dokumen Yang Dipersetujui Tetapi Tertakluk Kepada Soal Balas". At the beginning of the
C trial, the plaintiff's counsel informed the court that all documents were agreed documents. It was submitted by the plaintiff's counsel that this however still meant that the maker had to be called to prove the contents as the contents were not admitted 'automatically'.

D **[15]** Three cases were referred to. In *AlliedBank (Malaysia) Bhd v. Yau Jiok Hua* [1998] 2 CLJ 33; [1998] 6 MLJ 1 it was stated at p. 14 "where a document is sought to be proved in order to establish the truth of the facts contained in it, the maker has to
E be called. … Non-compliance with this rule will result in the contents of the document being hearsay …". In *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1994] 7 CLJ 509 under held "[2] The words in the letter "… tendered through its maker …" appeared to run counter to the subsequent words "dispensing
F with formal proof". Consequently the police report although included in part II of the agreed bundle, could not be put in evidence without calling its maker. And since the 1st respondent was not called as a witness the police report could not be taken into account at all in deriving any conclusion". The third case was
G *Chong Khee Sang v. Pang Ah Chee* [1983] 1 LNS 57; [1984] 1 MLJ 377 which held "once a document is included in an agreed bundle, it is no longer necessary to prove the existence or execution. Nor is it necessary to produce the original. But so far as the contents of the documents are concerned, the truth of the
H same has to be proved, in the absence of any specific admission of the facts contained therein".

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[16] The principles enunciated in the above cases are that the truth of the agreed documents are considered as admitted where parties (in this case the plaintiff) has not objected to it. At p. 531 of *Jaafar Shaari & Siti Jama Hashim (supra)* the following propositions were taken as well settled:

> (1) Whether the contents of a document that has been included in an agreed bundle may be used by either party to prove or disprove a fact in issue depends entirely upon the terms of the agreement between the solicitors having conduct of an action. If by their agreement they dispense with formal proof and also agree to the truth of the contents of a particular document, then its contents may be relied upon either side to establish or to disprove a fact in issue. On the other hand, if the agreement is only to forgo proof of the making of the document, then, the contents may not be so used. …
>
> (2) Where a document is included in an agreed bundle without any qualification, then no question as to its formal proof arises and its contents may be relied upon to establish a fact in issue. …
>
> …

[17] Applying the above propositions to our instant case, all documents which were agreed are subject to cross-examination (Part B) as in C and D were made agreed documents without any qualification by the plaintiff's counsel. Hence C 16-18 is an agreed document in terms of authenticity and contents. It is further not necessary for the defendant to call Dr Koshy as a witness because what is being offered through C 16-18 is the clarification on the clinical examination that had been done. The essence of the answers to questions 2 - 4 was that no breast examination was done and as to whether he noticed any lesion/abnormality on the breast, his answer was "breast examination not done". The answers given were his (Dr Koshy) nurse prepared the deceased, ECG was done by him. No signs of pain while in preparation and when ECG being performed, no lesion/abnormality on the breast was noticed, no tumour noted, no information offered in relation to the breast tumour and it seemed normal. There were some questions directed towards DW3 on the ECG. DW3 had given evidence that the blouse and undergarment has to be removed for an ECG and in doing an ECG a tumour or growth can be noticed and a nurse is not qualified to detect a breast tumour. In relation to the answer of Dr Koshy that no breast examination had been

done and the question that if a patient was wearing a bra, whether it would be possible to see a lesion or breast mass, DW3 said it would not be possible. The sum total of the medical questionnaire is that no breast examination was done and the nurse having prepared the deceased for ECG was not qualified to have detected the tumour. The plaintiff had not questioned the fact that the nurse had prepared the deceased for the ECG or that the nurse could not have detected the breast tumour. It is therefore probable that the deceased had breast tumour then. Even if the contents in C 16-18 are held to be disputed, the facts of the nurse preparing the deceased for the ECG and her competence to detect the tumour remained intact.

[18] The statement to the medical examiner Dr Koshy in B 129-131 was signed by the deceased at p. 131. In the proposal form, Part 7 of the declaration (B 84) states the information given in the proposal form and any information given to the medical examiner is true, full and complete and no important information has been withheld. It is further stated that "this information will form the basis of the contract of assurance between me and you". It follows any untrue and incomplete statement would be a ground for the defendant to avoid the contract of assurance. In *Aetna Universal Insurance Sdn Bhd v. Fanny Foo May Wan* [2001] 1 CLJ 476 it was held at p. 481:

> ... the statement to the medical examiner forms part of the proposal form and was subject to the basis clause stated therein. The express terms quoted above, both in the statement to the medical examiner and the proposal form itself stated that both the documents form part and parcel of the same application. ... Reference was expressly made in the proposal form to the effect that the answers in any medical examination form part of the proposal. The legal effect of a basis clause in a proposal form is that it entitles the insurer to avoid the contract simply by showing that the statement was inaccurate or incorrect ... .

[19] In this instant case the defendant has proved the answers given by the deceased in her statement to Dr Koshy were inaccurate and incorrect. Arising from these answers an inaccurate assessment was carried out in that no breast examination was done.

Date Of Supplementary Proposal Form

[20] On the date of the supplementary proposal form it was DW2's evidence that it was submitted three times on 11 March 2011, 20 March 2011 and 11 April 2011. The first two times it was declined as the system was done. The third time it was accepted and the defendant asked that the supplementary proposal form be dated 11 April 2011. There is no reason not to accept DW2's evidence that although the supplementary proposal form was dated 11 April 2011 it was submitted on 11 March 2011. This has however no bearing on the outcome of the case due to the earlier finding that the deceased knew as at 17 September 2010 that she had a breast tumour.

Fraudulent Misrepresentation Not Required

[21] The defendant only has to prove material non-disclosure and not fraudulent misrepresentation. Section 147(4) of the Insurance Act 1996 requires fraudulent misrepresentation if the policy sought to be invalidated is after the expiry of two years from the date on which it was effected. Here the policy sought to be invalidated is within the two years period from when it was effected.

Conclusion

[22] For the above reasons the plaintiff's claim is dismissed with costs.